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# **Background Checks**

## **Introduction**

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Pre-employment investigations and background checks are important to verify the accuracy of information provided by an applicant for employment and to ensure that an applicant is the best-qualified individual for a position. A thorough pre-employment investigation is also a preventive measure that enables employers to determine if a candidate's background indicates a possible safety threat of injury to other employees.

## **General Guidelines**

If conducted with inappropriate planning and training, a pre-employment investigation can be a potential source of liability. Pre-employment investigations should not be used as fishing expeditions into an applicant's background. Therefore, when conducting pre-employment investigations, employers should consider the following general guidelines:

- ◆ Employers should use pre-employment investigation tools that are reasonable, appropriate, and relevant to the position for which the applicant is applying.
- ◆ Pre-employment investigations should be consistently implemented with all candidates, regardless of class or position.
- ◆ Pre-employment investigations should be conducted by persons with special training such as a reputable investigative service.
- ◆ All information must be evaluated in compliance with the Fair Credit Reporting Act (FCRA), the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act, and any other applicable state and federal law.

With these guidelines in mind, employers should consider which background checks are appropriate given the nature and scope of the position sought. Many employers request criminal background checks to be completed by an outside consumer-reporting agency to reduce their exposure to negligent hiring claims because employers must exercise reasonable care in hiring an applicant and pursue reasonable effort to properly investigate an applicant's background. Employers who fail to conduct proper

background checks may be held liable for the employee's actions. Such agencies can conduct background investigations both internally and through contacting references provided by job applicants.

## **Employer Tools**

Employers have several tools that they can use to find information about employees and potential employees.

### **Consumer Reports**

Consumer reports are reports an employer obtains from a consumer-reporting agency. Employers typically use the information obtained from a consumer-reporting agency for verifying the following information:

- ◆ Criminal history.
- ◆ Driving records.
- ◆ Employment history.
- ◆ An individual's education.
- ◆ Social Security numbers.
- ◆ Professional licenses.

### **Credit Checks**

Credit checks are permissible when there is a close relationship between credit information and job performance. For example, when hiring for a bank teller position, an employer may want to conduct a credit check on the applicant to determine the applicant's credit history because the position will directly deal with money and financial information. When conducting a credit check on a potential applicant, companies must be careful because neutral decisions, such as the rejection of an applicant solely on the basis of a poor credit rating, may have a disparate impact on minority groups.

### **Investigation of Criminal Records**

An employer may investigate an applicant's criminal conviction record because the information might be job related and consistent with a business necessity. With exception, criminal record searches may retrace the past seven years. Before rejecting an applicant, the employer should consider the relationship between the conviction, the nature of the conviction, the number of convictions, rehabilitation efforts, and the applicant's fitness for the job.

### **Employment Verification**

In performing an employment verification check, employers may verify information about an applicant from former employers. Employers may obtain references to confirm and supplement information in the résumé or application. Additionally, employers may seek confirmation of background data (such as dates of employment, salary, position and duties, education, and professional licenses) and competency with respect to certain job-related skills (such as attendance, dependability, judgment, and initiative).

### **Obtaining a Release**

Before conducting a reference check, it is prudent for employers to obtain a release from the applicant. A release signed by the applicant can be a useful tool to facilitate obtaining information from the applicant's former associates, schools, and employers. A release should generally acknowledge that the information obtained by the prospective employer may not all be positive, and that the persons making statements

about the applicant are discharged from any legal liability. The release may be included in the disclaimer language on the application or as a separate document.

## **Obtaining References**

A reference check should consist of contacting people with knowledge of the applicant's actual work performance rather than a person in the organization's general human resources department. If possible, an applicant's former supervisor should be contacted. Other individuals with knowledge of the applicant's work performance may include an applicant's associates, team members, or peers, as well as any subordinates. Depending on the nature of the job, former clients or customers may also be knowledgeable sources of information about the applicant.

# Drug and Alcohol Testing in the Workplace

## Introduction

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Drug use on the job and the job-related effects of drug and alcohol use off the job are important concerns for employers. As a result, drug- and alcohol-testing programs are widely implemented in both the private and public sectors.

A significant number of states provide for the mandatory regulation of substance abuse policies in the workplace. However, such workplace policies are subject to scrutiny on several levels. For example, both testing and searches of employees may give rise to common-law invasion-of-privacy claims. Additionally, adoption of a workplace policy is subject to an employer's duty to bargain with a union. Further, discipline and discharge for substance abuse may be attacked through nondiscrimination laws and in court or arbitration under wrongful discharge theories.

These materials review federal regulations concerning drug and alcohol testing, discuss the federal Drug-Free Workplace Act and related regulations, and detail procedures for employers that are planning to implement a drug- and alcohol-testing program.

## Testing Limits

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Within reason, all employees **may** be tested. However, certain classes of employees sustain established limits as to how far employers may go. Those limits depend upon the nature of the employment relationship, as well as federal, state, and local laws.

## Private At-Will Employees

At-will employees have brought invasion-of-privacy claims when employers have engaged in random testing, and defamation claims when reports of false positive results have been circulated to others. At-will employees also have sued for breach of contract based upon information about drug testing in an employee handbook.

## Union Employees

Courts, interpreting the National Labor Relations Act (NLRA), mandate that employers bargain collectively with unions about substance abuse testing programs. This prevents an employer from

unilaterally implementing drug testing for union employees unless there has been a clear and unmistakable waiver by the union of its right to bargain over these issues.

The National Labor Relations Board (NLRB) generally disfavors such a waiver. The NLRB **does not** require employers to bargain over pre-employment testing programs, except in situations such as hiring halls where the union has become a participant in the hiring process.

## Nonunion Contract Employees

A drug-testing program need not necessarily be contained within an employment contract in order for it to be valid. However, to avoid breach-of-contract lawsuits, employees should agree, in writing, to comply with all personnel policies implemented by management before or during employment and should argue specifically to abide by the employer's substance abuse testing program.

## Public Sector Employees

Federal, state, and local government employees have Fourth Amendment constitutional protection generally not enjoyed by their private sector counterparts. Drug tests initiated by public employers are subject to prohibitions against unreasonable search and seizure. Random testing should be limited to employees who work in safety-sensitive positions.

## Job Applicants

Applicants have fewer privacy rights than employees. Employers often make offers of permanent employment conditioned upon successful completion of a drug test. The Americans with Disabilities Act (ADA) regulations do not hold such a pre-employment test for illegal drugs to be an unlawful pre-employment medical examination. However, no such exclusion is provided for pre-employment alcohol tests. In fact, pre-employment alcohol tests are often regarded as being of questionable value, since applicants may easily abstain from drinking for the short period of time needed to obtain a negative test result.

Administering drug tests before an offer of employment is extended may prove problematical because information gathered from a drug test about a person's medical condition or history **may not** be considered before a job offer proposal. Consequently, employers should delay drug tests until they have extended a conditional offer of employment. Thus, the employer does not have pre-offer knowledge of real or apparent disabilities revealed by test results and cannot be accused of basing a decision not to hire on the applicant's actual or perceived disability.

## Americans with Disabilities Act

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The Americans with Disabilities Act (ADA) **does not** prohibit discrimination against an individual based on that individual's current use of illegal drugs. *Current use of illegal drugs* means the illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem. Current users need not be accommodated and may be discharged (or not hired) for testing positive.

An employer is not prohibited from adopting or administering reasonable policies or procedures including, but not limited to, drug testing — designed to ensure that an individual who formerly engaged in illegal drug use is not engaging in current illegal use of drugs.

The ADA does, however, protect former drug users who have successfully completed treatment or who are participating in treatment and persons erroneously regarded as illegal drug users. An employer **may not** discriminate on the basis of illegal drug use against an individual who is not engaging in current illegal use and who fulfills one of the following:

- ◆ Successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully.
- ◆ Is participating in a supervised rehabilitation program.
- ◆ Is erroneously regarded as engaging in such use, but is not engaging in such use.

Additionally, individuals who are using a drug taken under supervision by a licensed health care professional or other legal uses are protected against discrimination. Given the distinction between legal and illegal drug use under the ADA, employers should use a physician as a medical review officer (MRO) to verify test results and separate illegal drug users from persons lawfully taking prescribed medications.

Under the ADA, alcoholism is treated differently in comparison to illegal drug use. Tests for alcohol use are classified as “medical examinations,” whereas tests to determine the current illegal use of drugs are generally not considered to be medical examinations. Accordingly, employers may neither require a medical examination nor make inquiries of an employee as to whether the employee is an individual with a disability or as to the nature and severity of the disability. Alcohol tests must be job related and consistent with business necessity and, if given to applicants, may be administered only after conditional offers of employment are extended. As a practical matter, such pre-employment alcohol tests are of questionable value. Importantly, the ADA **does specifically allow** employers to prohibit the on-the-job use of alcohol and to prohibit employees from being under the influence of alcohol while in the workplace.

An employer may also hold an employee who engages in illegal drug use or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of the employee.

Individuals who are using a drug taken under supervision by a licensed health care professional or other legal uses are also protected against discrimination. Tests to determine whether employees or applicants are using prescribed drugs must be job related and consistent with business necessity. Under the ADA, employees who receive positive results on fitness for duty tests may be entitled to reasonable accommodation.

Since the ADA increases the legal risks involved in testing for such drugs as pain relievers and tranquilizers, the risks of testing for legal drugs probably outweigh the benefits except in safety-critical jobs or cases where a substance abuse professional has authorized follow-up testing after an employee has returned to work from treatment for drug abuse. Given the distinction between legal and illegal drug use under the ADA, employers should use a physician as a medical review officer to verify test results and separate illegal drug users from persons lawfully taking prescribed medications.

The ADA permits employers to perform any testing required by Department of Transportation (DOT), Department of Defense (DOD), or Department of Energy regulations. It also allows employers to prohibit employees from using or being under the influence of illegal drugs in the workplace and from violating the Drug-Free Workplace Act.

# Transportation Employee Drug and Alcohol Testing

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Federal law regulated by the Department of Transportation (DOT) requires various forms of drug and alcohol testing by employers in certain transportation industries.

Employers in these industries are required by the DOT to implement highly specific drug-testing programs conforming to detailed regulations. Under the DOT regulations, all employees who need a commercial driver's license (CDL) to perform their work are subject to drug testing. The regulations apply to any employer with a single CDL employee. Additionally, all employers should regard the DOT rules as a benchmark for their testing programs.

## Drug-Free Workplace Act

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According to the U.S. Department of Labor, millions of Americans use illicit drugs and nearly 75 percent of these users are employed. Companies that have implemented drug-free workplace programs achieve dramatic benefits such as decreased absenteeism, a declining number of accidents, and increased productivity.

### Covered Employers

All direct recipients of federal grants and most federal contractors holding a single contract under the federal acquisition regulations that exceeds \$100,000, not for the acquisition of commercial goods, and performed in part (or in whole) in the United States must comply with the federal Drug-Free Workplace Act. The act applies to employees and facilities engaged in directly performing work under such contracts and grants. It does not apply to subcontractors or second-tier recipients of pass-through grants, nor does it apply to companies that hold multiple small contracts totaling more than \$100,000. A company would be subject to the act only if the value of a single contract is more than \$100,000. A company that has several contracts which, when combined, total more than \$100,000, is not subject to the act.

### Policy

Covered employers are required to retain a drug-free workplace accompanied by both a policy and a drug-free awareness program.

The policy must notify employees performing work under the contract or grant of the following prohibitions and the penalties for convictions:

- ◆ Employee may not manufacture, distribute, possess, or use controlled substances in the workplace.
- ◆ Employees must report any criminal convictions for manufacturing, distributing, dispensing, possessing, or using controlled substances in the workplace to the employer within five days.

With respect to employees who report such convictions, employers have 30 days to take appropriate disciplinary action, up to and including discharge, or to require satisfactory participation in an assistance/rehabilitation program. The act gives contractors and grantees discretion to decide what action to take. Contractors must also report any employee convictions for workplace drug crimes of which they have been notified to the contracting agency within 10 days.

The act also requires contractors and grantees to establish drug-free awareness programs informing employees of the employer's drug-free workplace policy, the adverse effects of drug abuse, the penalties that will be imposed for workplace drug violations, and any available drug counseling, rehabilitation, or assistance programs. However, the act does not require that a particular rehabilitation program be provided.

Under the act, drug testing, employee assistance programs, and supervisor training are optional. Such options and the ways unionized employers choose to exercise their discretion under the act are subject to collective bargaining. Thus, such employers may have to bargain over whether treatment will be offered and whether employees will be reassigned to jobs that do not involve the performance of federal contract work instead of being fired.

Grantees and contractors should maintain a current list of the facilities and departments performing federal contract work and have operable programs within 30 days of receiving contracts or grants. Any government audits may include a review of Drug-Free Workplace Act compliance programs.

## Considerations When Implementing a Drug- and Alcohol-Testing Program

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Employers must consider a variety of factors when implementing a drug- and alcohol-testing program. The employer should determine the following:

- ◆ Why the program is being implemented.
- ◆ Who will be tested.
- ◆ What types of tests will be given.
- ◆ What substances will be tested.
- ◆ Who will give the tests.
- ◆ The consequences of a positive test.

## Reasons to Implement Testing Programs

Testing programs **may** be implemented for the following reasons:

- ◆ To comply with federal requirements. These include requirements for certain Department of Defense (DOD) contractors, employers subject to the Nuclear Regulatory Commission, and employers subject to Department of Transportation (DOT) testing programs.
- ◆ To save money. Studies have shown that annually employers lose billions of dollars due to drug abuse among employees. These costs result from lost productivity, increased absenteeism, drug-related accidents, medical claims, and theft.
- ◆ To control insurance costs.
- ◆ To reduce workers' compensation premiums.
- ◆ For employee safety.

- ◆ To discourage drug-users from applying for employment. When an employer has a pre-employment drug-testing program, potential applicants who are drug users are less likely to apply for employment.
- ◆ To avoid negligent hiring and retention claims. An employer with a drug- and alcohol-testing program may be able to avoid claims of negligence for hiring or retaining employees who the employer knew or should have known had a substance abuse problem.

## Employees to Be Tested

Employers must decide which employees will be tested. The options are to test applicants only, all employees, or merely those employees in safety-sensitive or security-sensitive positions. Employers may also decide to test only those employees they reasonably suspect are under the influence of alcohol or are using illegal drugs.

## Types of Tests

The types of drug or alcohol tests that can be given include the following:

- ◆ **Pre-Employment.** Testing is given before employment to determine if the applicant is using illegal drugs. Most employers do not give pre-employment alcohol tests.
- ◆ **Reasonable Suspicion.** An employee may be tested if the employer has a reasonable basis to suspect an employee is using drugs or is at work under the influence of alcohol.
- ◆ **Post-Accident.** Testing is given after an employee is involved in an accident. Such testing is generally given if it is provided for in the employer's policy, placing the employee on notice of post-accident testing, and either personal injury is involved or damage to property is estimated at a minimal level.
- ◆ **Random.** Testing is given on an unannounced basis and employees are selected for testing on a random basis.
- ◆ **Follow-Up.** Testing is given on a scheduled or random basis when an employee returns to work after completing rehabilitation or counseling for substance abuse.
- ◆ **Periodic.** Testing is given at specified times. This may be used for employees who have returned to the workforce after testing positive or employees who are in safety- or security-sensitive positions. For example, commercial motor vehicle drivers may be required to submit to an annual test in addition to being subjected to random testing.

## Testing for Substance Type

Employers **may** test for the following types of substances:

- ◆ Alcohol.
- ◆ The five-drug panel required for DOT testing — cocaine, opiates, amphetamines, PCP, and marijuana.
- ◆ An eight-drug panel or as many substances as a laboratory is capable of accurately testing.
- ◆ Abused prescription drugs.

The common drugs of abuse are those contained in the five-drug panel required for DOT testing. Employers that test beyond those drugs likely incur an unnecessary expense.

# Testing Laboratory

Care should be taken in the selection of a laboratory to analyze the tests. Employers required to test employees under federal drug-testing programs must use laboratories certified for those programs. Even when not required by law, it is preferable to have a laboratory that is certified to perform drug testing in federal programs.

It is important to have a reputable laboratory, experienced and knowledgeable in the proper methods of handling and analyzing urine samples and breath alcohol tests. A good chain of custody is essential to ensure unadulterated samples have been analyzed and that there may be no question as to which sample has been analyzed.

The laboratory should have the highest quality-control standards. A screening test should be used for samples with a confirming test for positive results. The most reliable confirming test is considered to be gas chromatography/mass spectrometry. Laboratory personnel must be willing to defend results and testify in arbitration or court hearings.

Employees should be given notice of test results and an opportunity to establish a legitimate explanation for positive drug-test results to a medical review officer (MRO). Positive drug test results should be verified by the MRO before being reported to the employer.

## Consequences of a Positive Test Result

Any drug- and alcohol-policy must have a clear statement as to the consequences of a positive result or for the refusal by an employee to take a required test.

The consequences for refusing to be tested should be similar to the penalties for failing a test thereby offering employees an incentive to be cooperative. If an employee assistance program is part of the policy, one element should include referral to the EAP.

During policy development, employers must consider the following questions in determining a response to positive test results:

- ◆ Will there be an opportunity for rehabilitation?
- ◆ Is the program to be a one-, two-, or three-strike program?
- ◆ Will an employee be terminated upon their first positive test result?
- ◆ Will the employee be required to complete or merely enroll in a rehabilitation program before being permitted to return to work?
- ◆ Will the employee be required to enter into a last-chance agreement?
- ◆ Will there be a disciplinary suspension or a suspension until the employee is drug free?
- ◆ If the employee is in a safety-sensitive or security-sensitive position, will there be a transfer or demotion after a positive test?
- ◆ Will the transfer or demotion be for a specified period of time or indefinitely?

## Other Features of a Good Testing Policy

A good testing policy will provide the following:

- ◆ Clearly describe the prohibited conduct and the consequences for such conduct.

- ◆ Consider whether to create an EAP.
- ◆ Effectively communicate the policy and program to employees and supervisors. Employees should be required to separately sign the policy even if they are already required to sign a general acknowledgment of receipt of a policy handbook.
- ◆ Ensure adequate training for supervisors and education for employees.
- ◆ Require consent forms for all tests and make clear that refusal to comply will be considered a violation of the policy.
- ◆ Ensure an employee's privacy is protected in the testing process and dissemination of test results.
- ◆ Document all performance inadequacies.

## **State Law Considerations Concerning a Drug- and Alcohol-Testing Program**

Employers who are not covered by federal laws or regulations must consider whether state or local laws or regulations concerning drug and alcohol testing apply.

Some states have mandatory laws governing the conduct of drug and/or alcohol testing. Some states prohibit companywide and random drug and alcohol testing, unless federal law or regulation requires testing. Other states require that prior to any drug or alcohol testing, the employer must make an EAP available to employees and establish a comprehensive policy that explains all aspects of the testing program. And a number of states have requirements concerning the procedures to be followed in drug and alcohol testing.

When substance abuse testing is not mandated by federal regulations, employers should inquire whether state or local laws restrict their ability to test or offer incentives for certain testing programs.